Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-265
	)	
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

OPPOSITION OF LIBERTY MEDIA CORPORATION
TO PETITION FOR PARTIAL RECONSIDERATION

Liberty Media Corporation ("Liberty Media") hereby opposes the Petition for Partial Reconsideration of the Commission's Second Report and Order ("Petition") in this proceeding[1] submitted by the Wireless Cable Association International, Inc. ("WCA"). WCA's request that the Commission afford any aggrieved multichannel video programming distributor ("MVPD") standing under Section 616 is contrary to the plain language of that section, as well as its legislative history, and lacks any public policy justification.

Section 12 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") added Section 616 to the Communications Act, directing the Commission to adopt regulations "designed" to prohibit MVPDs from

[1] Second Report and Order, MM Docket No. 92-265, FCC 93-457 (rel. Oct. 22, 1993).

engaging in coercive, discriminatory or other specifically prohibited conduct against "video programming vendors." 47 U.S.C. §536(a)(3). In order to enforce these prohibitions, Congress further required regulations providing "for expedited review of any complaints made by a video programming vendor pursuant to this section." 47 U.S.C. §536(a)(4). Consistent with its focus on video programming vendors, the only specific remedy identified by Congress is mandatory "carriage." 47 U.S.C. §536(a)(5).

The legislative history of Section 616 makes clear that Congress intended to provide expedited review for "any complaints brought pursuant to this provision."[2] Thus, Congress did not provide expedited review to video programmers and another form of review to all others -- it granted "expedited review" to all complaints under Section 616 and limited the class of complainants to video programmers.

Following this statutory directive, the Commission properly limited standing to initiate an adjudicatory proceeding under Section 616 to "[a]ny aggrieved video programming

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[2] Conf. Rep. No. 862, 102d Cong., 2d Sess. 82 (1992) ("provide for expedited review of any complaints brought pursuant to this provision") (emphasis added); see S. Rep. No. 92, 102d Cong., 1st Sess. 79 (1991) ("Senate Report") ("provide for expedited review of any complaints brought pursuant to this section") (emphasis added); H.R. Rep. No. 628, 102d Cong., 2d Sess. 111 (1992) ("House Report") ("provide for expedited review of complaints made pursuant to this section").

vendor."[3] 47 C.F.R. §76.1302. Likewise, the Commission authorized remedies such as "mandatory carriage of complainant's programming" for violations that make sense only for video programmer complainants. See 47 C.F.R. §76.1302(s)(1). Indeed, Section 76.1302 (from the notice provisions in Subsection (a) to the statute of limitations in Subsection (r)) is premised upon a video programmer complainant.

WCA offers a hodgepodge of excerpts from the legislative history of the 1992 Cable Act regarding the alleged problems that it was intended to address and then asserts that Congress enacted Section 616 as the remedy.[4] For example, WCA quotes concerns regarding cable operator "market power" from the Senate Report and claims unequivocally that "Section 616 was adopted by Congress to eliminate that threat." WCA Petition at 4. WCA fails to mention, however, that the Senate Report identifies five different provisions addressing this "problem," which in turn added or amended seven different sections of the Communications Act. Senate Report at 23.

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[3] WCA claims that the Commission's regulations are "silent as to who has standing to file a complaint when a violation of Section 616 occurs...." WCA Petition at 4. Section 616 and the Commission's implementing rules are clear -- only "video programming vendors" have such standing.

[4] WCA's present petition appears to be an afterthought. Although WCA notes that it filed comments and reply comments "in this proceeding" (WCA Petition at 1 n.2), it never addressed the Commission's proposals to implement Section 12. See Second Report and Order, Appendix B.

Thus, WCA would substitute its reading of the "policy of the legislation as a whole" for the plain language of Section 616. In Board of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361, 373-74 (1986), the Supreme Court rejected this very exercise:

> Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of Congressional intent.

In short, the "'plain purpose' of legislation...is determined in the first instance with reference to the plain language of the statute itself." Id. at 373.

Federal agencies and courts alike cannot substitute their judgment for that of Congress in extending standing to seek relief under federal statutes:

> When a statute expressly provides remedies, courts must be extremely reluctant to expand its sweep by augmenting the list of prescribed anodynes. To the exact contrary, a court confronted with such a situation should ordinarily conclude that the legislature provided precisely the redress it considered appropriate.

Sterling Suffolk Racecourse L.P. v. Burrillville Racing Ass'n, Inc., 989 F.2d 1266, 1270 (1st Cir.), cert. denied, 114 S. Ct. 634 (1993). Thus, the Sterling Court rejected any "implied

right of action" where the statute "explicitly identifie[d] the parties entitled to bring actions." Id. Here, Congress clearly limited standing to complain under Section 616 to video programmers.

As both Congress and the Commission have recognized, vertical integration between cable operators and programmers has contributed substantially to diversity.[5] Consequently, the Commission has sought to "strike a balance" in its regulations:

> In implementing the provisions of Section 616, we believe that our regulations must strike a balance that not only prescribes behavior prohibited by the specific language of the statute, but also preserves the ability of affected parties to engage in legitimate, aggressive negotiations. Because the statute does not prohibit distributors from acquiring exclusivity rights or financial interests from programming vendors, we believe that resolution of Section 616 complaints will necessarily focus on the specific facts pertaining to each negotiation, and the manner in which certain rights were obtained, in order to determine whether a violation has, in fact, occurred.

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[5] For example, the House Report identified evidence of the benefits of vertical integration:

> Other witnesses before the Committee testified that vertical relationships strongly promote diversity and make the creation of innovative, and risky, programming services possible. These witnesses point to C-Span, CNN, Black Entertainment Television, Nickelodeon, and the Discovery Channel as examples of innovative programming services that would not have been feasible without the financial support of cable system operators.

House Report at 41. It also noted additional information indicating that "some concerns about discrimination against rival programming services may be overstated." Id.

Second Report and Order at ¶14 (emphasis added). The Commission recognized that the "practices at issue...must be evaluated within the context of specific facts pertaining to each negotiation." Id.

However, WCA's proposal to extend standing to "third parties" uninvolved in the carriage negotiations will necessarily destroy this balance. Indeed, WCA has given the Commission a preview of what to expect from such standing. Rather than "specific facts," the Commission will be faced with the "beliefs" of unidentified WCA members and news reports of Sumner Redstone's belated and incredible claims of trepidation in pursuing Viacom's rights. WCA Petition at 5-6. Because WCA would have no first-hand knowledge of the underlying contract negotiations, presumably it would seek to interject itself into those private negotiations or to obtain third-party discovery under 47 C.F.R. §76.1302(g). WCA's proposal would be disruptive, burdensome to the Commission and other parties, and serve no public interest.

To support its request, WCA claims that cable operators could "render Section 616 a paper tiger" by coercing a video programmer to grant exclusivity and then ensuring the "programmer's silence" through threats of retaliation. WCA Opposition at 5. However, WCA ignores the prohibition in Section 616 addressing this very issue -- MVPDs are prohibited "from coercing a video programming vendor to provide, and from

retaliating against such a vendor for failing to provide, exclusive rights against other multichannel video programming distributors as a condition of carriage on a system." 47 U.S.C. §536(a)(2); see 47 C.F.R. §76.1301(b). Likewise, WCA fails to consider the limitations on exclusivity provisions under 47 U.S.C. §548(c)(2)(C), (D) and 47 C.F.R. §76.1002(c)(1), (2).

Conclusion

For the foregoing reasons, Liberty Media respectfully requests that the Commission deny WCA's Petition. The relief sought by WCA, which would require a complete overhaul of the Commission's regulations implementing Section 616, is contrary to the plain statutory language and its legislative history and would serve no public interest purpose.

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Respectfully submitted,

Robert L. Hoegle TFB

Robert L. Hoegle
Carter, Ledyard & Milburn
1350 I Street, N.W.
Suite 870
Washington, D.C. 20005
(202) 898-1515

Attorneys for
Liberty Media Corporation

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Opposition of Liberty Media Corporation to Petition for Partial Reconsideration" was served this 24th day of May, 1994 by first-class mail, postage prepaid, upon the following:

Paul J. Sinderbrand, Esquire
Dawn G. Alexander, Esquire
Sinderbrand & Alexander
888 16th Street, N.W.
Suite 610
Washington, D.C. 20006

Counsel for Wireless Cable Association International, Inc.

Robert L. Hoegle by TTB

Robert L. Hoegle